No. 147

JUN 13 1942

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

317US #29
OLD-PAR

R. E. OLDS, et al.,

Petitioners,

vs.

TOWN OF BELLEAIR,

Respondent.

PETITION FOR WRIT OF CERTIORARI
AND BRIEF IN SUPPORT OF PETITION

GILES J. PATTERSON,
Attorney for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

R. E. OLDS, et al., *Petitioners,*

vs.

TOWN OF BELLEAIR, *Respondents.*

PETITION FOR WRIT OF CERTIORARI

The petition of R. E. Olds, et al., respectfully shows to this Honorable Court:

STATEMENT OF THE CASE

This suit was brought by R. E. Olds, a citizen of Michigan, against the Town of Belleair, a municipal corporation, organized under the laws of Florida. The complaint (R. 1) asks for alternative relief: (a) for a judgment upon coupons (Schedule C, R. 7) amounting to $44,700.00, which had matured upon 100 bonds with a face value of $1,000.00 each, which had been issued by the Town of

134602

Belleair Heights, the predecessor corporation of Defendant; (b) for a judgment against the Defendant for money had and received from the sale of bonds.

The Town of Belleair Heights which issued the bonds was incorporated by Chapter 9686 of the Laws of Florida, 1923, and was abolished by Chapter 10335, Acts of 1925; that act created the Town of Belleair and provided that it should assume all of the obligations of the former Town of Belleair Heights.

The bonds sued on were a part of an issue of $300,000.00 par value Public Improvement Bonds dated July 1, 1924, in the usual negotiable form, with recitals that they were issued pursuant to an affirmative vote of a majority of the electors of the Town qualified to vote at an election duly held for that purpose, and pursuant to an ordinance of the Town and the requirements of the State Constitution and the Laws of Florida. The bonds were duly executed and sold by the Town. The proceeds derived from the sale of the bonds were used for the construction of the improvements for which the money was borrowed.

The complaint (R. 3) alleged that in 1936 one Alvord and other taxpayers of the Town instituted a suit in the State Court against the Town and its bondholders, including R. E. Olds. The prayer of that bill was for an injunction against the levy of a tax to pay the bonds, because the bonds were void.

The Supreme Court of Florida on June 20, 1939, held that the bonds were void ab initio, because at the time the

election which approved the issue of the bonds was held, there could not have been, under the provisions of the Town charter, any qualified voters: *Olds v. Alvord,* 139 Fla. 745.

The Town answered the Complaint in the instant case (R. 8-11 inc.) alleging the invalidity of the bonds under the decision of the Florida Court, and that the money received from the sale of the bonds was used for building improvements for the benefit of a private corporation, in violation of the Florida Constitution (R. 10).

About two months later, the Town filed what it called "an additional defense" (R. 19 et seq.) to which it attached the final decree in *Alvord v. Olds,* and filed a motion for summary judgment "upon the additional defense". To the motion were attached as exhibits the bill and the answer of the Town in *Alvord v. Olds,* supra, (R. 39-123). The District Judge on November 9, 1940, entered a summary judgment (R. 123-4) holding that the State Court in *Olds v. Alvord,*

> "determined and finally adjudged that the proceeds of the bonds sued upon were used for the benefit of private corporations and not for public purposes of the Town of Belleair; that said question of fact, having been so litigated and determined, cannot be litigated in this case."

From this summary judgment, Plaintiff, Olds, appealed to the Fifth Circuit Court of Appeals. On June 2, 1941, that Court rendered its decision (120 Fed. (2d) 492) accepting the decision of the Florida Supreme Court as final with respect to the invalidity of the bonds as such;

the Circuit Court nevertheless reversed the District Court upon its ruling that the State Supreme Court had determined that the money received from the sale of the bonds was not used for public purposes, saying:

> "no issues were finally adjudged so as to make an estoppel by judgment in a suit in another cause of action, except those necessarily or actually decided in the final decree."

As authority for this it cited *Russell v. Place,* 94 U. S. 608, and *Fulton v. Gesterding,* 47 Fla. 150, as well as other cases.

The case was sent back to the District Court with direction that

> "If on the other counts (of the Complaint) there be any relief available under Florida law growing out of the retention or use of Olds' money, it is still open to inquiry * * * The judgment is reversed and the cause is remanded for further proceedings."
> 120 Fed. (2d) 492.

Under this mandate the case was returned to the District Court where that issue was tried by the District Judge without a jury. The testimony and exhibits are contained in the Record (R. 125-255).

The District Judge made his Findings of Fact and Conclusions of Law (R. 256-66), holding that the Town had the authority to make improvements of the type constructed; that the improvements were public municipal improvements; that the Town officials in good faith believed that

they were authorized to issue the bonds; that there was no fraud involved in either the issue or sale of the bonds, and entered judgment for the Plaintiff for the amount of money which the City received from its sale of the bonds. (R. 266).

From this judgment, Defendant Town appealed. The Fifth Circuit Court of Appeals on April 23, 1942, reversed the judgment of the District Court and remanded the case with direction to enter a judgment for the Town and against the Plaintiff. (R. 293).

Application is made to this Court by the Petitioners for a Writ of Certiorari to review the juudgment of the Circuit Court of Appeals for the Fifth Circuit because:

1. The decision of the Fifth Circuit Court of Appeals that (R. 290).

> "*it is settled law that no such recovery* (for money had and received) *can be had* in regard to monies obtained and spent by towns in violation of express prohibitions of Constitution or statute, and this is especially so when the prohibition violated is one against borrowing money without a vote of the people."

is directly contrary to the decisions of the Supreme Court of Florida, by which the Federal Courts are bound in a matter of state law.

(a) Evidencing the law of Florida, is *State v. Greer*, 88 Fla. 249, which was an action in mandamus to compel the Town of Quincy to levy a tax to pay bonds which it had issued to build a school house. The Supreme Court of Florida held that Article XII of the Constitution of Florida was

> "an implied organic limitation upon the express authority of the Legislature to prescribe the jurisdiction of the powers of the municipalities as such"

and for that reason, the bonds of the Town were absolutely void since they were issued in violation of that constitutional limitation. Yet, it held

> "Mandamus will not compel the tax levy and payment of the bonds or the interest thereon, for the reason that, the bonds being illegally issued, it is not the duty of the municipal officers to pay them. Such payment of the bonds has been enjoined. *But the holder of the bonds can recover in an action at law, on appropriate common counts, the money paid for the bonds with interest according to law.* See 19 R. C. L., p. 1032, Note 11; 5 McQuillin on Munic. Corp., Sec. 2349; 5 Dillon's Munic. Corp. (5th Ed.), Sec. 961. See, also, *Cullen v. Seaboard Air Line R. Co.*, 63 Fla. 122, 58 So. 182." (Emphasis supplied).

> "Payment of a judgment duly obtained for the money received by the municipality would be a legal duty of the municipal officers, which duty the relator could enforce by mandamus or other appropriate proceedings in due course of law."

"The implied limitation that was held by the court to make the issue of the bonds contrary to organic law, was developed by judicial interpretation after the bonds had been sold, and the money had been used by the city for its purposes as expressly and specifically authorized by the statute. These circumstances clearly render the municipality liable for the amount of the money so received by it, with interest. See *Brill v. Washington Railway & Electric Co.*, 215 U. S. 527, 30 S. Ct. 177, 54 L. Ed. 311; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153. See *City of Henderson v. Redman*, 185 Ky. 146, 214 S. W. 809, 7 A. L. R. 346, and notes."

So in this case, was the implied limitation developed by judicial interpretation 14 years after the bonds had been issued.

(b) In *Nuveen v. Quincy*, 115 Fla. 510, an action at law against the town for money received on the same bonds, the Supreme Court of Florida denied recovery *solely* because the claim was barred by the statute of limitations and in its opinion, said:

"In *State ex rel. Nuveen v. Greer*, 88 Fla. 249, text 255, 102 So. 739, 37 A. L. R. 1298, this court said mandamus would not lie to compel a tax levy and payment of the illegal bonds, but *that the holder of the bonds could recover in* an action at law, on appropriate common counts, *the money paid for the bonds with interest according to law, citing cases.*" (Emphasis supplied).

(c) In *Logan v. B. P. I.*, 118 Fla. 184, a suit for money had and received by a school board upon a warrant which it had issued in violation of a statute of the state, the Court held that:

"where money is borrowed in good faith by a governmental unit, and the money is used for an authorized purpose, the unit may be liable on principles of equity

and justice, as on an implied assumpsit, for money had and received, provided such borrowing is not expressly forbidden by applicable law. See 44 C. J. 1146 and authorities cited."

The Charter of the Town of Belleair Heights expressly authorized the town to issue bonds in order to construct public improvements.

In these cases the Supreme Court of Florida held that a holder of a bond, warrant or note of a municipality or other public corporation of the State of Florida, issued in violation of the State Constitution or State Statutes could recover for money had and received.

It has also held that a holder of a void obligation could recover where money was borrowed without a vote of the people, contrary to a statute of the State of Florida.

In *B. P. I. of Manatee County v. Cassidy*, 122 Fla. 536, and in *Tax District v. Hillman*, 131 Fla. 725, the Court permitted recovery of the reasonable value of property which had been purchased by a school board, although it held that the promissory note, or notes and mortgage, representing the balance due on the purchase price, were void, because no election had been held as rquired by Sc. 509, C. G. L., 1927.

In *Babcock v. B. P. I. Dade County*, 104 Fla. 693, the Court had held that notes issued without an election were void. Recovery upon the notes as such was denied in the *Babcock* case, supra, but recovery on common counts was granted in the *Cassidy* case, supra.

In a series of cases involving paving certificates issued by Hillsborough County, under Chapter 9316, Acts of

Florida, 1923, the Court held the Act void, because it had not been passed in accordance with the requirements of the State Constitution. But the County was held liable

> "on a quantum meruit basis for the value of the work done and materials furnished."

notwithstanding the fact that the County was not obligated on the certificates. See *Harwell v. Hillsborough County*, 111 Fla. 361; *Webb v. Hillsborough County*, 128 Fla. 471; *Gulf Life v. Hillsborough County*, 129 Fla. 98; *Hillsborough County v. Highway E. & C. Co.*, 145 Fla. 83.

The Fifth Circuit Court of Appeals in support of its decision (Notes 5 and 6 to its opinion) cites the *Cooey*, *Logan* and *Johnson* cases, infra, *in every one of which plaintiff recovered a judgment for money had and received.*

In *Logan v. B. P. I.*, supra, and in *B. P. I. v. Cooey*, 118 Fla. 184, the Court held that the holders of school warrants could recover for money had and received by the school board, though the warrants were void.

In *Johnson v. Anthony*, 116 Fla. 302, the Court gave judgment for the holder of a note of the town to recover the money had and received by it on the note, although the town had *no authority* to execute the note.

The Court's statement of what it terms the "settled law" was perhaps due to a preconceived idea of the law announced in its own decisions in *Phoenix Mutual Life Insurance Co. v. McAllen*, 82 Fed. (2d) 581, and *Cameron*

Co. v. De La Vergne E. Co., 93 Fed. (2d) 373, cited in Note (6) to its opinion. But its opinion in the *Phoenix* case cites only a *Texas statute* and *Texas cases*. The city had purchased property for an airport and had executed negotiable notes without having held an election prior thereto. The Court denied recovery for the purchase price of the land, as well as upon the notes. Judge Sibley concurred *on the authority of the Texas court's decision*, but was of the opinion that the conclusion of that court was not correct. The decisions of the Texas Court are directly contrary to the decision of the Florida Supreme Court in *B. P. I. v. Cassidy*, supra, which allowed recovery on quantum meruit, although the notes and mortgage were held void because no election had been held. See also *Special Tax School District No. 1 v. Hillman*, supra.

Cameron County v. De La Vergne, supra, also rests entirely upon the authority of the Texas constitution and statutes, as the opinion of the Court shows.

Since *Erie Railroad v. Tompkins*, 304 U. S. 64, Federal Courts must follow the law of the state, especially where this is embodied in decisions of the state Supreme Court; they have no power to exercise an independent judgment as to the law. The decision of the Circuit Court of Appeals is directly contrary to the decisions of the Florida Court.

Litchfield v. Ballou, 114 U. S. 190, (also cited in Note 6) is not an authority. It was decided by this Court long before *Erie Railroad v. Tompkins*, supra.

2. The Circuit Court of Appeals has departed from the established rule of law that a decision of a Circuit Court of Appeals rendered on an appeal from a District Court becomes the law of the case and is controlling upon the Circuit Court in a second appeal in the same case.

Thompson v. Maxwell Land Grant & Ry Co., 168 U. S. 451,

Tyler v. Magwire, 84 U. S. 253,

Cook v. Porter, 78 U. S. 671,

Messinger v. Anderson, 255 U. S. 436,

Alabama G. S. R. Co. v. Carroll, 84 Fed. 772 (5th C. C. A.),

Montgomery County v. Cochran, 126 Fed. 456 (5th C. C. A.),

Cogswell v. Drennan, 271 Fed. 289 (5th C. C. A.),

Stone Sand & Gravel Co. v. U. S. 195 Fed. 68 (5th C. C. A.),

Canal Commercial Trust & Savings Bank v. Bank of Plant City, 278 Fed. 178, (5th C. C. A.),

Texas Company v. Pensacola Maritime Corp. 292 Fed. 61 (5th C. C. A. Fla.)

The decision of the Circuit Court of Appeals rendered June 2, 1941, 120 Fed. (2d) 492, became the law of this case, and was binding upon it in the second appeal. In its opinion dated June 2, 1941, the Circuit Court of Appeals, referring to the decision of the State Court in *Olds v. Alvord*, supra, said (120 Fed. (2d) 492):

"We think the issue as to the private object and use of the proceeds of these bonds dropped out of the case and was unnecessary to be considered and was in fact not decided in this decree (of the State Court). That decree superseded the other. No issues were finally adjudged so as to make an estoppel by judgment in a suit on another cause of action, except those necessarily or actually decided in the final decree."

It remanded the case to the District Court for a trial of the question of whether

"there be any relief available under Florida law growing out of the retention or use of Olds' money."

The District Court tried this issue upon the evidence and rendered a judgment for the plaintiff. (See Findings of Fact R. 257 to 261, and Conclusions of Law, especially 3rd and 4th. R. 264, and Judgment, R. 266-267.)

In its opinion dated April 23, 1942, however, the Circuit Court of Appeals said

"Expressly affirming that the constitutional vice had not been purged out of them, it (the Florida Supreme Court) said 'it so happens that the proceeds of this $300,000. issue was used for building a sea wall and making other improvements which were chiefly beneficial to a private corporation,' "

and held that because of the decision of the Florida Court, Plaintiffs

> "were under a heavy burden to show that in fact and in law the proceeds of the bonds were so laid out by the town in improvements as to make it liable for the value thereof to the town. This burden heavy in fact and in law plaintiffs have not sustained."

The Circuit Court of Appeals makes other references to the opinions in *Olds v. Alvord*, supra, and *State v. Belleair*, 125 Fla. 669, (neither Plaintiff nor any other bondholder was party to the last named case).

These repeated references to, and quotations from, the opinions of the Florida Supreme Court show that the Circuit Court of Appeals on the last appeal accepted this statement of the Florida Supreme Court as determinative of the issue of fact which was tried by the District Court, notwithstanding the fact that it had remanded the case to the District Judge to try this issue — thus rendering useless its own prior mandate. Though the District Judge found this issue for the Plaintiff, the Court of Appeals now says

> "the record supports but one conclusion, that the moneys were obtained and spent pursuant to the very plan, and with the very result reprobated by the Supreme Court of Florida"

thereby reversing the judgment of the court below without holding that the Findings of the District Judge were not supported by the evidence of the Plaintiff.

Apparently the Circuit Court of Appeals overlooked the fact that when it held that the judgment in *Olds v. Alvord*, supra did not estop the Plaintiff, and cited *Fulton*

v. Gesterding, 47 Fla. 150, and *Russell v. Place*, 94 U. S. 606, as authority, it recognized that those decisions were controlling and that both of them hold that where there is no estoppel by judgment,

> "the whole subject matter of the action will be at large and open to a new contention."

The District Judge, however, so treated the case at the trial, and tried the issue upon the evidence presented before him, without regard to the action taken by the Supreme Court of Florida. His decision was not influenced by those cases because of the opinion and mandate of the Court of Appeals. He is now reversed by the Court of Appeals because he followed the mandate.

The only other possible explanation for the decision of the Court of Appeals is that it assumed that the evidence presented in *Olds v. Alvord*, supra, was substantially the same as the evidence presented to the District Judge at the trial of this case. But the Court should not have indulged in that assumption. The record in *Olds v. Alvord* was offered in evidence by the Defendant (R. 184-87) as an exhibit. The District Judge excluded the record upon our objection for the reasons given (R. 187). If the Circuit Court of Appeals had thought that action erroneous, it could have reversed the case and sent it back to the District Judge with instructions to consider the record as a part of the evidence. Or the Circuit Court of Appeals itself could have compared the record of *Olds v. Alvord* which was offered in evidence with the record in this case, because the tendered record in *Olds v. Alvord* was sent to the Court of

Appeals by an order of the District Court (R. 272. If the Court of Appeals itself had made the comparison, it would have found that material facts were proved by the Plaintiff in this case which were not in evidence in *Olds v. Alvord.* There is nothing in the opinion that indicates that the Court ruled upon the exclusion of the record of *Olds v. Alvord* by the District Judge, or that it made a comparison of the evidence in that case with the evidence in the present case.

The District Judge made detailed Findings of Fact and Conclusions of Law which are in some instances mixed with Conclusions of Fact (R. 256-266). He held that the proceeds received by the Town from the sale of the bonds were used for the construction of public improvements; that these improvements were not constructed for the benefit of a private corporation; that the transaction was in good faith and in the belief that the Town had authority to construct them. The Circuit Court of Appeals did not hold that any one of the Findings of the District Judge was not supported by the evidence. It simply ignored his Findings.

Rule 52 of the Rules of Federal Civil Procedure, which authorizes the Circuit Court of Appeals to reverse the Findings of the District Judge where they are "clearly erroneous", does not authorize that Court to ignore the Findings of the District Judge merely because of a dictum in a case tried in the State Court, where the evidence in the State Court was not substantially the same as that upon which the Findings of the District Judge were predicated; especially where the Court of Appeals on a former

appeal, had held that the Plaintiff was not estopped by the judgment in the State Court, and had remanded the case to the District Judge for a trial at which the whole subject matter was open to a new contention.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals of the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 10157, *Town of Belleair v. R. E. Olds, et al.*, and that the said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioners will ever pray.

R. E. OLDS,
MRS. M. U. OLDS,
MRS. GLADYS ANDERSON,
MRS. BERNICE ROE and CLARENCE B. ROE,
her husband,

Petitioners,

By.....

Counsel.

PETITIONER'S BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

R. E. OLDS, et al., *Petitioners,*

vs.

TOWN OF BELLEAIR, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari gives two reasons why the Writ should be issued by this Court.

1. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CONTRARY TO THE ESTABLISHED LAW OF FLORIDA.

Since the Petition cites and quotes from the decisions by the Florida Court which support this statement, it is not necessary to repeat those citations or quotations here.

It is not out of place, however, to add that the decision of the Court of Appeals is not in accord with decisions of this Court;

Chapman v. Douglas Co., 107 U. S. 348;
Marsh v. Fulton Co., 77 U. S. 676;
Louisiana v. Wood, 102 U. S. 294;
Reed v. Plattsmouth, 107 U. S. 568;

that its decision is not in accord with the decisions of other Federal Circuit Courts of Appeals.

Bangor Savings Bank v. Stillwell, 49 Fed. 721;
Geer v. School District, 111 Fed. 682;
Chelsea Savings Bank v. Ironwood, 130 Fed. 410;
Gilman v. Furnald, 149 Fed. 941.

Many of these cases and several of the Florida cases cited in the Petition, refer to and quote from the early leading case of *Argenti v. San Francisco*, 16 Cal. 255, opinion by J. Field.

The latest textual statement of the rule is found in Jones on Bonds and Bondholders, Vol. 1, Sec. 507, p. 583.

> "Though the bonds of a municipality are *illegal* not only on account of irregularities in their issue, but *even for lack of basic power to issue them*, a purchaser who has in good faith surrendered his money on the common understanding of himself and the corporation that the instruments were enforceable (and this intent of the municipality is to be presumed against it) such purchaser though denied action on the instruments themselves may recover his outlay upon a contract to repay what has been received, which the law implies for the municipality from the transaction in which it engaged."

Other authorities cited by the Florida Court are 19 R. C. L. p. 1032; 5 McQuillin on Municipal Corporations, Sec. 2349; 5 Dillon Municipal Corporations (5th Ed.) Par 961.

The Florida decisions cited and quoted in the Petition also rely as authority upon other Florida cases dealing generally with actions for money had and received; applying the same rules to municipalities that it applies to individuals and corporations.

> See *Cullen v. S. A. L. R. R. Co.*, 63 Fla. 122,
> *St. Johns Electric Co. v. St. Augustine*, 81 Fla. 588,
> *Hawkins v. Garrison*, 97 Fla. 156,

all of which rest upon the early Florida case of *Gordon v. Camp*, 2 Fla. 422. These cases hold that an action for money had and received is the equivalent of a bill in equity, liberal in form, and favored by the courts as a remedy; *Gordon v. Camp*, supra; that the action

> "is applicable in all cases where the defendant has obtained money which ex aequo et bono he ought to refund";
> *Cullen v. S. A. L. R. R. Co.*, supra,

that

> "the gist of the action is that the defendant under the circumstances is obligated by the ties of natural justice to refund the money", Idem;

that the defendant, having received the money for something which he could not deliver, and had no legal right to convey,

> "it is as if he had received it for the plaintiff's use. * * * The law in such case casts upon the defendant the obligation to return the money".
>
> *Hawkins v. Garrison,* supra.

To the same effect are decisions of State Courts of Alabama, Kansas, Kentucky, Michigan, Minnesota, Montana, Nevada, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Vermont and Wisconsin, cited in Vol. 7, A. L. R., p. 353.

The rule does not defeat the purpose of a statutory provision if proper limitations are reorganized. These limitations are accurately stated in Jones on Bonds and Bondholders, Vol. 1, Sec. 517, p. 584;

> "(1) The municipality must have actually received the money sought to be recovered; (2) the transaction must have been free from any question of fraud or collusion, and of any concerted purpose between the municipality and the one advancing the money intentionally to evade or violate the law; (3) the money must have been applied to some legitimate municipal purpose."

The record in this case shows that none of the limitations was violated.

Neither the Constitution of Florida, nor the charter of the Town, prohibited it from issuing bonds or from constructing these improvements. Even if no election had been held a recovery on a quantum meruit is not prohibited. See *B. P. I. v. Cassidy,* 122 Fla. 536. See also *First National Bank v. Goodhue,* 120 Minn. 362, 139 N. W. 599.

It may be that the Circuit Court of Appeals thought that it was following the law of Florida as announced in the cases involving suits *upon bonds* of the Town of Belleair. But neither of those cases, referred to by the Circuit Court of Appeals, involved the right of a bondholder to *recover for money had and received* if the bonds were void. They do not and could not have any bearing upon the law of Florida governing Plaintiff's right to recover in this case for money had and received.

2. THE CIRCUIT COURT OF APPEALS IGNORED ITS OWN LONG ESTABLISHED RULE, WHICH IS ALSO THE RULE OF THIS COURT,—THAT A DECISION IN A FORMER APPEAL IN THIS SAME CASE (120 Fed. (2d) 492) IS THE LAW OF THE CASE; ITS LAST JUDGMENT IS CONTRARY TO THE LAW ANNOUNCED IN ITS FORMER DECISION.

The Petition quotes statements from the former opinion of the Circuit Court of Appeals which are inconsistent with and contrary to its last opinion. In its first decision in this case (120 Fed. (2d) 492) the Court of Appeals held that the judgment of the Florida Court in *Olds v. Alvord*, 139 Fla. 745, did not adjudicate the issue of whether the money received by the Town from the sale of its bonds was used for an illegal purpose. It said unequivocally that

> "the issue as to the private object and use of the proceeds of these bonds dropped out of the case and was unnecessary to be considered, and was in fact not decided".

That statement was conclusive upon the District Court at a trial of this case after it had been remanded. Under the rule established in the cases cited in the Petition, that decision was binding upon the Court of Appeals itself on the second opinion. Since the judgment of the Florida Court did not adjudicate that issue, and since this case was sent back to the District Court for a trial of that particular issue upon the facts, the statement of the Florida Court which is now quoted by the Circuit Court of Appeals did not influence the District Judge. It should not have influenced the Court of Appeals itself.

Apparently, the Circuit Court of Appeals overlooked the fact that *Fulton v. Gesterding*, 47 Fla. 150, which it cited in its former opinion in this same case (120 Fed. (2d) 492) specifically held that where the judgment in the former case was not a final adjudication of an issue,

> "the whole subject matter of the action will be at large and open to a new contention,"

in another case. Therefore, the subject matter of this case was at large before the Trial Court. Whether the money was used for an illegal purpose was the very issue which the District Judge was ordered by this Court to determine. Under Rule 52, Federal Rules of Civil Procedure, the District Judge was required to make findings of facts and reach a conclusion. Even though the facts proved in this case resulted in a conclusion differing from that reached by the Florida Court in *Olds v. Alvord*, supra, that does not justify a reversal by the Circuit Court of Appeals.

If it had appeared at the trial of this case that the evidence was substantially the same as that offered in *Olds v. Alvord*, supra, the Federal Court under *Erie R. R. v. Tompkins*, 304 U. S. 64, might have been bound to draw the same conclusion. But the findings of fact by the District Judge (R. 257-261) are based upon the evidence *in this case. The evidence taken in Olds v. Alvord*, supra, *is not in the record.* Defendant Town tendered the record of that case, but the Trial Judge excluded it for reasons given by him (R. 189); but he transmitted the original exhibit (the record in *Olds v. Alvord*, supra) to the Circuit Court of Appeals by a special order (R. 272) made when this appeal was taken.

The opinion of the Circuit Court of Appeals neither refers to the ruling of the District Judge excluding the record in *Olds v. Alvord*, supra, nor to the record itself. If the Court of Appeals had held that the District Judge erred in excluding the record in *Olds v. Alvord*, it could have remanded the case to the District Judge to determine whether the evidence in that record was so similar to the evidence in this record as to require the District Court to follow the decision of the Florida Court.

Under Rule 52, Federal Rules of Civil Procedure, the Circuit Court of Appeals might itself have compared the record in *Olds v. Alvord* (which was sent to it by the District Court) with this record and might have determined for itself whether the two cases were alike. But the opinion shows that it did not do so. If it had, it would have found an entirely different case here from that presented in the State Court and that the facts sustained the Findings and Conclusions of the District Court.

The situation is analagous to that presented in *Cromwell v. Sac County*, 94 U. S. 351. That was an action upon coupons. An action was tried by the State Court on other coupons from the same bonds, resulting in a judgment for the County. The Federal Court nevertheless gave judgment for Plaintiff, holding that where a suit is upon the same cause of action as that of a prior case, the judgment in that case is final, not only as to every matter which was offered, but as to any admissible matter that might have been offered. But where the suit is upon a different cause of action, the judgment in the prior case is conclusive, *only as to such matters as had been actually litigated and determined.* Since Plaintiff proved that he was a bona fide holder for value without notice of the defects in the instruments, the judgment in the prior case by one who did not prove that he was a bona fide holder did not bar a subsequent action on the coupons.

Likewise, the judgment in *Olds v. Alvord*, supra, did not under the former decision of the Circuit Court of Appeals determine that the proceeds of the bonds had been used for an illegal purpose; it did not estop the plaintiff from proving *in this action that the money was used for a legal purpose.* Plaintiff was entitled to a trial of his rights upon the facts proved by him.

Rule 52, Federal Rules of Civil Procedure, has been variously construed by different Circuit Courts of Appeals. It provides that the Findings of Fact by the District Judge shall not be reversed unless they are "clearly erroneous". The Court of Appeals made no reference to those Findings; it merely substituted its own judgment for that of the District Court.

The District Judge having found the facts were as alleged by Plaintiff, the Circuit Court of Appeals should have affirmed the judgment; its last opinion, which does not do so, is inconsistent with and is in effect a reversal of its earlier opinion.

.....

Attorney for Petitioners